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JAN 09 1998

AZ CORP COMMISSION

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BEFORE

THE ARIZONA CORPORATION COMMISSION

JAN 9 4 10 PM '98

IN THE MATTER OF COMPETITION IN
THE PROVISION OF ELECTRIC
SERVICES THROUGHOUT THE STATE
OF ARIZONA

DOCKET No. U-0000-94-165

**CONSUMERS' JOINDER IN SRP'S OBJECTION TO PROCEDURAL ORDERS AND
REQUEST FOR A NEW PROCEDURAL ORDER**

ASARCO, Incorporated, Cyprus Climax Metals Corporation,
and ENRON Corp. (collectively referred to herein as the
"Consumers"), hereby join in SRP's recently filed Objection to
Procedural Orders and Request for a New Procedural Order, and the
Consumers also request a modification to the Procedural Order
dated December 1, 1997, the First Amended Procedural Order dated
December 11, 1997, and the Second Amended Procedural Order dated
December 15, 1997 (collectively referred to herein as "the
Procedural Order"). It is respectfully requested that the Arizona
Corporation Commission (the "Commission") further amend the
Procedural Order to remove the allowance of cross-examination of
witnesses.

The Commission initially objected to any evidentiary
hearing in this matter on the basis that such a hearing would
serve only to blur the line between the Commission's legislative
and judicial functions and transform this proceeding from a rule-
making procedure into an adversarial and quasi-judicial one. This
was borne out by the citation to the United States Supreme Court
in Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S.Ct. 67

1 (1908) speaking of the distinctions between judicial and
2 legislative acts of the Virginia State Corporation Commission,
3 said:

4 "A judicial inquiry investigates,
5 declares, and enforces liabilities as they
6 stand on present or past facts and under laws
7 supposed to already exist. That is its
8 purpose and end. **Legislation, on the other**
9 **hand, looks to the future and changes**
10 **existing conditions by making a new rule, to**
11 **be applied thereafter to all or some part of**
12 **those subject to its power.** The establishment
13 of a rate is the making of a rule for the
14 future, and therefore is an act legislative,
15 not judicial, in kind * * *." (emphasis
16 added)

17 211 U.S. at 226, 29 S.Ct. at 69.

18 As it now stands, the Procedural Order allows cross-
19 examination of witnesses thereby transforming this proceeding into
20 a judicial hearing, not one of rule-making. An evidentiary hearing
21 is completely unnecessary for the Commission to complete its
22 **legislative** act of implementing competition in Arizona. The
23 Consumers agree with SRP that the distinctions between contested
24 cases and rule-making procedures under the Administrative
25 Procedure Act, A.R.S. § 41-1001 et seq., should be considered
26 here. The existing Procedural Order effectively transforms this
from a rule-making proceeding under A.R.S. § 41-1021 et seq., into
a contested case under A.R.S. § 41-1062 et seq.

No cross-examination of witnesses is necessary nor
should it be permitted. Cross-examination of witnesses is a key
procedural difference between contested matters and legislative
hearings. The allowance of cross-examination calls into question

1 the veracity of witnesses, puts witnesses on the defensive and
2 inhibits the flow of information and dialogue, as well as turning
3 the process into an adversarial rather than cooperative one.
4 Further, with the substantial number of parties who have now
5 intervened in this matter, the allowance of cross-examination of
6 witnesses will take an inordinate amount of valuable time and
7 consume limited resources which would be better spent by the
8 parties preparing and gearing up for the implementation of
9 competition.¹

10 Keeping the focus on the Commission's legislative
11 process and the open flow of information from all interested
12 parties should be paramount in this proceeding. By transforming
13 this into an adversarial, evidentiary proceeding, the Commission
14 has now, unfortunately, limited the number of participants,
15 restricted the flow of information and data, and has alienated at
16 least one party who has been an active and substantial contributor
17 in the process thus far - SRP. SRP's involvement in and
18 coordination with this process is paramount since SRP serves a
19 significant portion of the electric consumers in Arizona. By
20 amending the Procedural Orders to eliminate the right of cross-

21
22 ¹ One of the affected utilities which was to have filed unbundled
23 service tariffs by December 31, 1997 has failed to do so.
24 Allegedly this failure was due, at least in part, to the lack of
25 completion of the Commission's preparation of guidelines and
26 design of the framework for the implementation of competition.
If the instant hearing continues for many more days or weeks,
that is yet additional time spent by key personnel from all
affected utilities, consumers and other interested parties in
hearings and on cross-examination which would be better spent
preparing for competition and completing tasks toward that end.


1 examination of witnesses, the process will become less adversarial
2 and cure much of what SRP objects to in its Objection.

3 For all of the foregoing reasons, it is respectfully
4 requested that the Commission issue an amended Procedural Order
5 which removes the rights of cross-examination of witnesses. Such
6 an amendment saves not only time and resources of all parties and
7 the Commission, but encourages a wider array of participants to
8 become involved in this hearing.

9 DATED this 9th day of January, 1998.

10 FENNEMORE CRAIG, P.C.

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4 Arizona Corporation Commission
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9 hand-delivered this 9th
10 of January, 1998 to:

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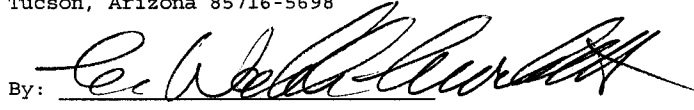
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